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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 809

UNITED STATES OF AMERICA, EX REL. EVSEY S. PETRUSHANSKY A/K/A PETER GREEN, A FUGITIVE FROM JUSTICE OF THE UNITED MEXICAN STATES, PETITIONER

v.

ANTHONY R. MARASCO, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 9-17) is reported at 325 F. 2d 562. The opinion of the district court (Pet. 18-29) is reported at 215 F. Supp. 953.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1963. The petition for a writ of

certiorari was filed on February 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner should be released from custody in extradition proceedings on the ground that the complaint upon which his initial arrest was based as inadequate, where formal documents setting forth probable cause were subsequently filed by the demanding country.

2. Whether evidence tending to prove an alibi was properly excluded at the hearing.

STATUTES AND TREATY PROVISION INVOLVED

18 U.S.C. 3184 provides as follows:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge

under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

18 U.S.C. 3190 provides as follows:

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Article III of the Treaty with the United States of Mexico and Extradition, February 22, 1899, 31 Stat. 1818, provides pertinently:

Extradition shall not take place in any of the following cases:

1. When the evidence of criminality presented by the demanding party would not justify, ac-

cording to the laws of the place where the fugitive or person so charged shall be found, his or her apprehension and commitment for trial, if the crime or offense had been there committed.

* * * *

Article X of said treaty provides as follows:

On being informed by telegraph or otherwise, through the diplomatic channel, that a warrant has been issued by competent authority for the arrest of a fugitive criminal charged with any of the crimes enumerated in the foregoing articles of this treaty, and on being assured from the same source that a requisition for the surrender of such criminal is about to be made accompanied by such warrant and duly authenticated depositions or copies thereof in support of the charge, each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded.

STATEMENT

1. On October 3, 1962, extradition proceedings were initiated at the request of the United Mexican States, pursuant to treaty between Mexico and the United States. The Assistant United States Attorney for the Southern District of New York filed a complaint charging that petitioner had committed the crime of murder within the United Mexican States (R. 3).[1] A warrant of arrest was issued pursuant to

[1] "R." refers to the record filed by petitioner, consisting solely of the opinion of District Judge Noonan; "Tr." refers

18 U.S.C. 3184, and a detainer was placed against petitioner who was then incarcerated in a New York City jail on unrelated charges. On October 5, petitioner was released to federal authorities and arraigned before the United States Commissioner (R. 3). On or about October 21, the duly authenticated papers for the extradition of petitioner and one Earl Scott, with English translation, were filed. The extradition hearing was adjourned, at petitioner's request, until December 3 (Tr. 1-8). It was held on that day and was thereafter continued on later dates at petitioner's request (Tr. 7-9, 128, 141-141a).

2. At the hearing, the documents submitted by the Mexican authorities were introduced in evidence. Charged with the murder of Louis M. Vidal, Jr., of New York City, were petitioner, an American citizen, two others—Kaplan and Scott—and a Mexican named deGaray. The statements and depositions tended to show that some weeks before November 1961 Kaplan had told deGaray that he intended to come to Mexico with Vidal, who was his partner in a business venture and who, according to Kaplan, was

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to the typewritten transcript of the hearing before the United States Commissioner lodged by the government, which relates largely to the evidence offered on behalf of petitioner. The Commissioner based his finding of probable cause to hold petition upon a voluminous record of documents furnished by the Mexican government, which at present are in the custody of the Secretary of State. In view of the fact that petitioner does not here question the sufficiency of the evidence to establish such probable cause nor the accuracy of the summaries of such evidence by the district court and the court of appeals, our statement herein is based largely upon said opinions.

a very dangerous individual with whom he had had serious differences in the past (Pet. 14). On November 9, Kaplan, petitioner and Scott arrived at Mexico City from San Antonio and took rooms at the El Diplomatico Hotel. Vidal arrived in Mexico City from New York on November 11 and was taken to the Continental Hilton Hotel. Later that afternoon deGaray, pursuant to a previous request by Kaplan, brought him a 1953 Buick which he had borrowed (Pet. 13-14).

Kaplan's statement to the police recounted that he, petitioner and Scott picked up Vidal at his hotel that evening in the Buick. Kaplan dropped off at a bar. Petitioner and Scott returned about 3:00 a.m. and told Kaplan that "Vidal had not fulfilled his part of the deal and Scott had killed him." Scott was armed with a .38 caliber revolver. Kaplan let petitioner and Scott off at their hotel and called deGaray, telling him that Scott had killed Vidal (Pet. 16). DeGaray's version was that Kaplan told him that the Buick had broken down and that he should pick it up that morning; that when deGaray arrived to do so, he found bullet holes in the window and blood stains on the front seat and door; and that when he later asked Kaplan about the blood stains, Kaplan said it was not possible, that he had washed them off himself (Pet. 14-15).

It also appeared that Kaplan, Scott and petitioner had been in and out of their hotel rooms during the course of the night and seemed to be nervous and high-strung. The following night, Vidal was checked out of his hotel by Kaplan and his belongings were

placed in a Corvair. Two days later, a Corvair was found parked illegally at the airport. Within it was a valise containing Vidal's clothing. Petitioner, who had rented the Corvair, came to the rental agency later in the day. Petitioner expressed surprise that the car had been found at the airport, saying he had left it at his hotel. He had the key, paid the rental and asked whether anything was found in the car, to which he received a negative response. He appeared nervous and troubled (Pet. 15).

On November 18, two highway patrolmen saw blood-stained men's clothing by the side of the Mexico-Acapulco highway. Personal effects indicated they belonged to Louis M. Vidal, Jr., of New York City. Together with these was a key to Vidal's room at the Continental Hilton Hotel. On November 22, other officers found a corpse buried by the side of the road three kilometers from the place where the clothing was found. It was identified by Mrs. Teresa Vidal as the body of her husband, Louis M. Vidal, Jr. There were four bullet wounds in the head and neck (Pet. 13). A cartridge clip for .38 caliber bullets was later found by police on the floor of the Buick (Pet. 16).

Thus, the indications of petitioner's guilt were his demeanor after the crime, his association with the deceased during the critical hours, his control of the vehicle in which the victim was apparently killed, and petitioner's admitted knowledge of the murder (albeit he accused an associate).

3. Petitioner raises as an issue the exclusion of evidence which he offered at the hearing. Petitioner's counsel stated that he was prepared to produce

Eastern Airline tickets in the name of petitioner on the 12:05 a.m. flight from San Antonio for November 15, 1961 (the destination of the flight was not stated) and the passenger manifest for Braniff Airlines from Mexico City to San Antonio on November 14, 1961, at 3:45 p.m. These were objected to on the ground that they were hearsay and inadmissible under 18 U.S.C. 3190 (Tr. 16-22), and were excluded (Tr. 143).

Homer E. Cobe, whose business was "consultant, and finder and public relations", stated that he met Vidal on a previous occasion and thereafter conversed with him over the telephone some six or eight times. (Tr. 23-24). On November 14, 1961, about 5:30 p.m., he received a call from Vidal, who had promised to obtain information for him in Mexico. The call was a request for money, which Cobe was then unable to send him (Tr. 24-25). William R. Sauve, a stock broker, who worked with Cobe, said that he had had occasion to speak some five or six times over the telephone to Vidal. On November 13, 1961, at about 5:30 p.m., Vidal called to talk to Cobe about an oil deal and said he was in Mexico (Tr. 51-54). The commissioner excluded these conversations as in direct contradiction of the proof offered to support extradition to the effect that Vidal was killed on November 12 (Tr. 118).

4. On January 18, 1963, the commissioner rendered his decision, finding, *inter alia*, that a warrant for petitioner's arrest had been issued by the Mexican authorities on December 22, 1961, that the offense with which he was charged was punishable under the laws of Mexico and of the State of New York and

was within the provisions of the treaty with that country, that petitioner was the person named in such warrant and that the evidence was sufficient to establish probable cause that he had committed the offense charged. Petitioner was remanded to the United States Marshal to await the order of the Secretary of State (Tr. 143-146). On January 28, 1963, a writ of habeas corpus was issued by the United States District Court for the Southern District of New York, which was thereafter discharged on April 5, 1963. *United States ex rel. Petrushansky* v. *Marasco*, 215 F. Supp. 953. The court of appeals affirmed (Pet. 9-17).

ARGUMENT

1. Petitioner contends that the commissioner had no jurisdiction over his person, for the reason that the complaint merely alleged that the complainant had been informed through diplomatic channels of the matters set forth and for the further reason that the complaint insufficiently stated the nature of the charge. It was proper for the United States Attorney to file the complaint upon information received through diplomatic channels. *Fernandez* v. *Phillips*, 268 U.S. 311, 312. The treaty provision for temporary detention pending arrival of documentary evidence (see *supra*, p. 4) is plainly a reasonable measure to prevent disappearance of the fugitive in the interim. While the supporting documents are frequently filed with the complaint, it is sufficient if they are filed thereafter. *Yordi* v. *Nolte*, 215 U.S. 227. Petitioner made no objection to the detention while he was thus being held.

In any event, if sufficient ground is shown for detention, defects in the original arrest or commitment are immaterial. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 662. Cf. *Ex parte Bollman and Swartwout*, 4 Cr. 75, 114, 125. After the hearing, habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and whether the evidence warranted the finding that reasonable ground existed to believe the accused guilty. *Fernandez* v. *Phillips*, 268 U.S. 311, 312.

2. Petitioner's complaint that the commissioner improperly excluded evidence which it is claimed shows that he was out of the country at the time of the commission of the offense is wholly without merit. The evidence offered by Mexico constituted probable cause to believe that Vidal had been murdered on the morning of November 12. Petitioner offered evidence that Vidal made telephone calls to this country after the date of his alleged murder, and that petitioner himself left Mexico on November 14. While it is proper for an accused to produce evidence tending to explain ambiguities or doubtful elements in the *prima facie* case made against him, he is not entitled to contradict the evidence of guilt. *Desmond* v. *Eggers*, 18 F. 2d 503, 505 (C.A. 9). *Hyatt* v. *Corkran*, 188 U.S. 691, and *Mansey* v. *Clough*, 196 U.S. 364, relied upon by petitioner, hold merely that a person is not a fugitive within the meaning of Article IV, section 2, clause 2, of the Constitution of the

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The airplane tickets and manifest, which were offered without supporting testimony, were, in any event, hearsay.

United States where the undisputed evidence shows that he was not within the demanding state at the time of the offense charged. Here there was ample evidence that the offense was committed on November 12 and that petitioner was in Mexico City at that time.

The ultimate issue on an extradition hearing is the same as on a preliminary examination before a committing magistrate, whether there is probable cause to believe that the accused is guilty of the offense charged. *Charlton* v. *Kelly*, 229 U.S. 447, 460; *Collins* v. *Loisel*, 259 U.S. 309, 315-317; *Jimenez* v. *Aristeguieta*, 311 F. 2d 547 (C.A. 5), certiorari denied, 373 U.S. 914. See, also, Article III of the treaty (*supra*, pp. 3-4). A sufficient showing was made in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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